No. 87-1529

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

PSA, INC.,
Petitioner,

vs.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
RICHARD PRICE and JOE BRIDGES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether state law claims predicated upon an alleged state public policy against retaliation for union organizing activities are completely preempted by Section 2, Fourth of the Railway Labor Act ("RLA"), 45 U.S.C. § 152, Fourth.

2. Whether the Court of Appeals misapplied the applicable standard set forth in *Metropolitan Life Ins. Co. v. Taylor*, ____ U.S. ____, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987), when it held that RLA Section 2, Fourth does not completely preempt California law regulating union organizing activity.

PARTIES IN THE COURT OF APPEALS

All of the parties in the United States Court of Appeals for the Ninth Circuit are listed in the caption.

CORPORATE PARTY'S AFFILIATIONS

PSA, Inc. has, since the inception of this litigation, formally changed its name to PSGroup. PSGroup has the following subsidiary companies:

Pacific Southwest Trading Company
Statex Petroleum, Inc.
USTravel Systems, Inc.
Airline Training Center
PSA Overseas Finance N.V.
Doug Fox Travel Service, Inc.
International Travel Advisors, Inc.
Travelwise, Inc.
Doug Fox Parking, Inc.
Doug Fox Leasing, Inc.
Our World Tours, Inc.
The Fox Travel Institute, Inc.

Although this action was initiated when plaintiffs filed an action against PSA, Inc., their pleadings make it apparent they intended to sue Pacific Southwest Airlines, Inc., their employer at the time of the events in issue and a former subsidiary of PSA, Inc. Pacific Southwest Airlines, Inc. is now a subsidiary of USAir Group, Inc. Pacific Southwest Airlines' subsidiaries or affiliated companies are as follows:

Pacific Southwest Airmotive
PSA Services, Inc.
Pacific Aircraft Finance Corporation
Piedmont Aviation, Inc.
Henson Aviation, Inc.
Jetstream International Airlines, Inc.
Aviation Supply Corporation
Air Service, Inc.
Asheville Flying Service, Inc.
Pennsylvania Commuter Airlines, Inc.
Suburban Airlines, Inc.
Clark Leasing Corporation
USAir Fuel Corporation
USAir Leasing and Services, Inc.
USAir, Inc.

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PSA, Inc. (hereinafter "PSA"), through its undersigned counsel, hereby petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit denying PSA's petition to that Court for a writ of mandamus.

OPINIONS BELOW

The opinion of the Court of Appeals denying PSA's petition for a writ of mandamus (App. A) is reported at 829 F.2d 871. The order of the Court of Appeals denying PSA's petition for rehearing and rejecting PSA's suggestion for rehearing en banc (App. C) is not reported. The district court's order remanding the case to state court is

not reported, but that order and a transcript of the judge's statement upon granting the order are set forth in Appendices D and E, respectively.

JURISDICTION

The order of the Court of Appeals denying PSA's petition for a writ of mandamus was entered on October 6, 1987 (App. B). A petition for rehearing was denied, and a suggestion for rehearing en banc rejected, on December 8, 1987 (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves California Labor Code Sections 922 and 923; Section 2 of the Railway Labor Act, 45 U.S.C. § 152; and 28 U.S.C. §§ 1331 and 1441(b). These are reprinted in pertinent part in Appendix F.

CONCISE STATEMENT OF THE CASE

This case originated in May, 1985 when respondents Richard Price and Joe Bridges (hereinafter "plaintiffs") filed a complaint against PSA in the Superior Court for the State of California, San Diego County. Plaintiffs alleged, *inter alia,* that PSA had violated four federal statutes when it discharged them: Title VII of the Civil Rights Act of 1964, the Railway Labor Act ("RLA"), the Age Discrimination in Employment Act, and 42 U.S.C. Section 1981. In particular, plaintiffs alleged that PSA had discharged them in retaliation for their union organizing activities, thereby interfering with such activities in violation of Section 2, Fourth of the RLA, 45 U.S.C. § 152, Fourth. PSA timely removed the action to the United States District Court for the Southern District

of California under 28 U.S.C. Sections 1441(a) and (b). 829 F.2d at 872 (reprinted in App. A at 4a).

In January 1986, the parties entered into a stipulation, approved by the district court, which provided that plaintiffs could file a first amended complaint. The stipulation further provided:

> if upon filing of plaintiff's first amended complaint, it is apparent that there is no jurisdiction in the United States District Court, the parties agree that the action will be remanded to the Superior Court for the State of California, for the County of San Diego.

829 F.2d at 872 (reprinted in App. A at 4a).

Plaintiffs thereafter filed a First Amended Complaint, omitting any reference to the RLA, but repeating their allegations of discharge in retaliation for union organizing activities. Those allegations of retaliatory discharge were asserted to be the basis for state law claims predicated upon violation of the public policy inherent in California Labor Code Sections 922 and 923, prohibiting retaliation for union organizing activities. 829 F.2d at 872 (reprinted in App. A at 4a).

PSA refused to consent to remand the action to state court pursuant to the parties' stipulation on the ground that plaintiffs' claims of retaliation for union organizing activities were completely preempted by Section 2, Fourth of the RLA. Plaintiffs then brought a motion to remand the case to state court, which the district court granted. The district court held that "the Railway Labor Act does not preempt Plaintiffs' state law unlawful discharge causes of action based on public policy violations

of California Labor Code Section [sic] 922-923" (App. D). [1]

PSA filed a petition for a writ of mandamus with the United States Court of Appeals for the Ninth Circuit.[2] The Court of Appeals held that the remand order was reviewable on a petition for writ of mandamus, but denied the petition on the ground that plaintiffs' claims for wrongful discharge in retaliation for union organizing activities were not completely preempted by Section 2, Fourth of the RLA.

In reaching that result, the Court of Appeals first acknowledged that the test for determining whether a state claim is completely preempted is "whether Congress has 'clearly manifested an intent' to convert a state law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." 829 F.2d at 876 (reprinted in App. A at 12a), quoting *Metropolitan Life Insurance Co. v. Taylor,* ____ U.S. ____, 107 S.Ct. 1542, 1547, 95 L.Ed.2d 55 (1987). The Court of Appeals noted that the "clear manifestation of Congressional intent" necessary for complete preemption had first been found in Section 301 of the Labor Management Relations Act ("LMRA"), citing *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists,* 390 U.S. 557, 88 S.Ct. 1235, 20

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[1]This Court recently held that a federal district court has discretion to remand a removed case to state court when no federal claims remain in the action. *Carnegie-Mellon University v. Cohill,* ____ U.S. ____, 108 S.Ct. 614, 98 L.Ed.2d 720 (January 20, 1988). Because the central issue in the present case, however, is whether a federal question remains in the action, *Carnegie-Mellon* is not applicable.

[2]PSA also appealed the district court's decision. The Court of Appeals, however, held that the district court's remand was immune from appeal pursuant to 28 U.S.C. Section 1447(d). 829 F.2d at 873-874.

L.Ed.2d 126 (1968). The lower court then observed that this Court recently extended "the *Avco* principle" to find that Section 502(a) of the Employee Retirement Income Security Act ("ERISA") completely preempts state law claims within its scope. 829 F.2d at 875 (reprinted in App. A at 10a-11a), citing *Metropolitan Life Ins. Co. v. Taylor.*

The Court of Appeals focused the balance of its analysis on the *Taylor* decision, omitting any further examination of *Avco.* The lower court noted that in *Taylor,* this Court found the necessary "clear manifestation of congressional intent" in (1) the civil enforcement provision contained in ERISA Section 502(f) and (2) legislative history expressly stating that all actions brought pursuant to Section 502(a) are to be regarded as arising under the laws of the United States "in similar fashion to those brought under Section 301 of the [LMRA]." The lower court then found that the absence of a civil enforcement provision or other "direct expression of congressional intent" was determinative, and concluded that RLA Section 2, Fourth was not completely preemptive:

> The RLA contains no civil enforcement provision such as the provisions in ERISA and § 301 of the LMRA. In fact, Section 2, Fourth of the RLA contains no civil enforcement provision whatsoever. This circuit has held that an implied private right of action exists under RLA Section 2, Fourth. However, Congress has not indicated, as it did with LMRA § 301 and ERISA, that the RLA is 'so powerful as to displace entirely any state cause of action.' *Absent a direct expression of congressional intent* to create federal jurisdiction for all causes of action within the scope of Section 2, Fourth of the RLA, we believe we must abide by the well-pleaded complaint rule. Con-

> gress or the Supreme Court can steady us if either finds our step faulty.

829 F.2d at 876 (reprinted in App. A at 12a) (citations omitted, emphasis added). A request for rehearing was denied (App. C), and this Petition followed.

REASONS FOR GRANTING THE PETITION

I.

THIS PETITION PRESENTS IMPORTANT QUESTIONS CONCERNING FEDERAL COURT JURISDICTION AND THE CONGRESSIONAL SCHEME OF THE RAILWAY LABOR ACT WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

This petition presents important questions concerning whether Section 2, Fourth of the Railway Labor Act ("RLA") completely preempts any state cause of action for alleged interference by a covered carrier with union organizing activities. Petitioner's position is that the statutory language, statutory scheme and legislative history of the RLA demonstrate Congressional intent that all causes of action within the scope of RLA Section 2, Fourth are federal in character and therefore removable to federal court. Petitioner further contends that the Court of Appeals misapplied the applicable standard set forth by this Court in *Avco Corp. v. Machinists* and *Metropolitan Life Ins. Co. v. Taylor,* when it held that RLA Section 2, Fourth is not completely preemptive. These are issues of considerable importance to the enforcement of the Congressional scheme embodied in the RLA and the administration of justice in the federal courts, warranting this Court's intervention.

In recent rulings, this Court has recognized the importance of the complete preemption issue in other contexts, reaffirming its application to LMRA Section 301 and extending its application to cases within the scope of ERISA Section 502(a). *Metropolitan Life Ins. Co. v. Taylor,* ____ U.S. ____, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987); *Caterpillar Inc. v. Williams,* ____ U.S. ____, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). The complete preemption question is of equal importance in the context of RLA Section 2, Fourth, and therefore in this case. In enacting and amending the RLA, Congress singled out two critical, national industries (interstate carriers by air and railroads) for regulation because of their overwhelming and immediate influence on interstate commerce. Recognizing that the goal of stable relationships between labor and management required uniformity, Congress enacted a national scheme for regulation of this relationship. *See, International Ass'n of Machinists v. Central Airlines, Inc.,* 372 U.S. 682, 691-92 & n.15 & 16, 83 S.Ct. 956, 10 L.Ed.2d 67 (1963).

A central part of that national scheme is Section 2, Fourth of the RLA which prohibits carrier interference with the right of employees to join, organize or assist in organizing labor unions. *Texas & N.O.R. Co. v. Bhd. Ry. & S.S. Clerks,* 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034 (1930). It is now settled law that this provision may give rise to a private right of action, and at least one court of appeals has found in the legislative history a Congressional intent that "Section 2 would be enforceable by private plaintiffs *in federal court.*" *Stepanischen v. Merchants Despatch Transp. Corp.,* 722 F.2d 922, 926 (1st Cir. 1983) (emphasis added). *See also Texas & N.O.R. Co. v. Bhd. Ry. & S.S. Clerks, supra; United States v. Winston,* 558 F.2d 105, 108 n.3 (2d Cir. 1977); *Adams v. Federal Express Corp.,* 547 F.2d 319, 321 (6th Cir. 1976), *cert.*

denied, 431 U.S. 915 (1977); *Conrad v. Delta Air Lines, Inc.,* 494 F.2d 914, 918 (7th Cir. 1974); *Burke v. Compania Mexicana de Aviacion, S.A.,* 433 F.2d 1031, 1034 (9th Cir. 1970). The Congressional goal of uniformity in its scheme of national enforcement could only be achieved by a single federal substantive law governing all such actions. The lack of uniformity that would be created if the legislatures and courts of each of the 50 states could separately regulate this conduct would be completely at odds with that Congressional goal. Therefore, Congress must have intended state laws regulating this area of central concern to give way to federal law.

Once it is recognized that such state laws are absorbed in the uniform federal law mandated by Congress, it is clear the Congressional scheme requires that RLA Section 2, Fourth be completely preemptive. As this Court noted in *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists,* 390 U.S. at 560 (1968), "[R]emoval is but one aspect of 'the primacy of the federal judiciary in deciding questions of federal law.' " As in *Avco,* then, Congress has clearly manifested an intent that RLA Section 2, Fourth completely preempt any state claim within its scope.

The decision below, however, disregarded the statutory scheme of the RLA and specifically Section 2, Fourth, the legislative history of that provision, and the Congressional purpose in enacting that provision. Instead, the Court of Appeals focused exclusively on the absence of a civil enforcement provision such as those in ERISA and LMRA Section 301, and the absence of a "direct expression of congressional intent" such as the express reference to Section 301 in ERISA's legislative history. This extraordinarily narrow focus, based on an unjustifiably restricted reading of *Taylor,* is inconsistent with the analysis in *Avco* as well as the standard enunciated in

Taylor because it excludes consideration of other ways in which Congress clearly manifested its intent to completely preempt the area covered by RLA Section 2, Fourth.

This misapplication of *Taylor* by the Court of Appeals, resulting in that Court's failure to hold that plaintiffs' state claims are completely preempted, sanctions a potential end-run around the entire federal scheme — a result that Congress specifically sought to avoid. Congress has seen fit to provide criminal penalties for violations of RLA, Section 2 and has imposed upon a *federal* agency — the United States attorney — the duty to enforce the obligations of that statute. 45 U.S.C. § 152, Tenth. Moreover, civil remedies, including backpay and reinstatement, have been carefully developed by federal courts for individual employees who maintain private actions under Section 2, consistent with Congress' intent of limiting recovery for violations of federal labor law to make-whole remedies. *Conrad v. Delta Airlines, Inc.,* 494 F.2d 914 (7th Cir. 1974); *Burke v. Compania Mexicana de Aviacion, S.A.,* 433 F.2d 1031 (9th Cir. 1970). *Cf., Radio Officers v. NLRB,* 347 U.S. 17, 54-55, 74 S.Ct. 323, 98 L.Ed. 455, 485 (1954). There is no indication that Congress intended parties to such disputes, or the federal courts, to rely upon state courts to apply this carefully developed federal law consistently. Indeed, such a result is inconsistent with "the primacy of the federal judiciary in deciding questions of federal law." *Avco Corp. v. Machinists,* 390 U.S. at 560.

By holding that plaintiffs' state law claims for violation of the public policy inherent in California Labor Code Sections 922 and 923 are not completely preempted by the RLA, the Court of Appeals has created the possibility that conflicting state law principles and remedies will be

inflicted upon the RLA's uniform federal scheme. Further, this breach of the RLA's structure results from the Court of Appeals' misapplication of *Metropolitan Life Ins. Co. v. Taylor.* The need for guidance from this Court, therefore, is great.

II.

THE COURT OF APPEALS MISAPPLIED THIS COURT'S STANDARD FOR COMPLETE PREEMPTION IN HOLDING THAT ABSENT A CIVIL ENFORCEMENT PROVISION OR OTHER "DIRECT EXPRESSION" OF CONGRESSIONAL INTENT, RLA SECTION 2, FOURTH COULD NOT BE COMPLETELY PREEMPTIVE

A.

CONGRESSIONAL INTENT TO COMPLETELY PREEMPT STATE CLAIMS MAY BE EXPLICITLY STATED IN A STATUTE'S LANGUAGE OR IMPLICITLY CONTAINED IN ITS STRUCTURE AND PURPOSE; THE ABSENCE OF A CIVIL ENFORCEMENT PROVISION IS NOT CONCLUSIVE.

In *Metropolitan Life Ins. Co. v. Taylor,* ____ U.S. ____, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987), this Court reaffirmed the critical jurisdictional rule that "Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." 107 S.Ct. at 1546. This Court then held that a lawsuit purporting to raise only state law claims, which claims came within the scope of section 502(a) of ERISA, was "necessarily federal in character by virtue of the clearly manifested intent of Congress." 107 S.Ct. at 1548. The clear manifestation of Congressional intent necessary to establish complete preemption was found in the civil enforcement section of ERISA and in legislative history stating that all actions brought

pursuant to that section of ERISA "are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor Management Relations Act of 1947."

This Court did not hold in *Taylor,* however, that the existence of a civil enforcement provision or an express reference to LMRA Section 301 (such as the reference in ERISA's legislative history) is the *sine qua non* of complete preemption. Indeed, this Court left open the possibility that other "clear manifestations" of Congressional intent could suffice to establish complete preemption when it noted that "in the absence of explicit direction from Congress, this question would be a close one." 107 S.Ct. at 1547.

That openness to other manifestations of Congressional intent is in keeping with the well-established touchstone of preemption analysis: in determining whether federal law preempts state law, the essential inquiry is the intent of Congress in enacting the federal statute not the manner in which that intent is expressed. *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 738, 105 S.Ct. 2380, 2388, 85 L.Ed.2d 728 (1985). Preemption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977).

In its constricted reading of *Taylor,* the court below excluded consideration of the structure and purpose of the RLA, instead resorting to a ritualistic obeisance to the language of LMRA Section 301. Had the Court of Appeals examined the basis for the well-established principle that Section 301 is completely preemptive, it would

have been clear that the court's narrow reading of *Taylor* was incorrect.

The preemptive power of Section 301 is evident not from its language but from a close examination of its structure and purpose. As this Court has recently reiterated, "Congress did not state explicitly whether and to what extent it intended § 301 of the LMRA to preempt state law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208, 105 S.Ct. 1904, 1910, 85 L.Ed.2d 206 (1985). Rather, the completely preemptive power of Section 301 has been discerned from the legislative scheme and Congressional purpose behind its enactment. *Id.; Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-104, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962) (Congress intended principles of federal labor law uniformly to prevail over inconsistent local rules because the purpose of the statute — stability in collectively bargained agreements — would be hindered if those agreements were subject to potentially different federal and state legal principles).

It is this preemptive power, located in the Congressional purpose of stability through uniformity, which this Court has held to be complete preemption supporting removal of state claims to federal court. *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1986). In *Avco*, this Court echoed the *Lucas Flour* holding that "[a]n action arising under § 301 is controlled by federal *substantive* law and not state law even though it is brought in a state court," 390 U.S. at 559-560:

> We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor law .... *The Labor Management Relations Act expressly furnishes some substantive law. It points out*

> *what the parties may or may not do in certain situations.* Other problems will lie in the penumbra of express statutory mandates. . . . *Federal interpretation of the federal law will govern, not state law* . . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy . . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.

390 U.S. at 559-560 (emphasis added), quoting *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). The Court then held that "removal is but one aspect of the primacy of the federal judiciary in deciding questions of federal law." 390 U.S. at 560 (footnotes and quotations omitted).

Thus, because the congressional goal of stability through uniformity required the application of federal substantive law, the primacy of the federal judiciary in deciding questions of federal law dictated that the claims were removable:

> It was clear that, had petitioner [in *Avco*] invoked it, there would have been a federal cause of action under § 301 of the Labor Management Relations Act . . . .
>
> * * *
>
> The Court of Appeals held, and we affirmed, that the petitioner's action "arose under" § 301, and thus could be removed to federal court, although the petitioner had undoubtedly pleaded an adequate claim for relief under the state law of contracts and had sought a remedy available *only* under state law. The necessary ground of decision was that the preemptive force of § 301 is so powerful as to displace

> entirely any state cause of action "for violation of contracts between an employer and a labor organization."

Franchise Tax Board v. Laborers Vacation Trust, 463 U.S. 1, 23, 103 S.Ct. 2841, 2853, 77 L.Ed.2d 420 (1983) (emphasis in original).

The Court of Appeals in this case focused too narrowly on the specific factors present in *Taylor* by failing to consider the structure and purpose of RLA Section 2 and by ignoring the original basis of "the *Avco* principle." *Taylor*, however, must be read in light of *Avco*. It was not some mystical quality embodied in Section 301's civil enforcement provision which led the *Avco* Court to its decision; rather, it was the Congressional purpose manifest in the substantive protections of that statute — the goal of national uniformity and stability — which dictated the result in *Avco*. Although the *Taylor* decision was based in part on the fact that ERISA contained civil enforcement language identical to Section 301, the importance of that language was the fact that it demonstrated an identical goal: national uniformity. *Taylor* cannot be read to require that civil enforcement language be present before complete preemption will be found. Indeed, this Court has consistently held that the minor dispute provisions of the RLA completely preempt state law claims despite the absence of the civil enforcement provisions contained in LMRA Section 301 and ERISA Section 502. *E.g., Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972).

Further, *Taylor* cannot be read so narrowly as to require that Congress "directly express" its intent to completely preempt state law by explicit references to LMRA section 301. The court below erred in placing too great an emphasis on this factor's presence in *Taylor*. To

read *Taylor* as setting forth such a requirement would mean that no statute enacted before 1947, when the LMRA was enacted (or more probably no statute enacted before 1968 when section 301 was held to be completely preemptive), could have the required "direct expression" of legislative intent. This Court surely did not intend such an arbitrary result when it issued *Taylor,* and the Court of Appeals' reading of *Taylor* therefore is improper. This Court should intervene to guide the courts of appeals in the correct reading of *Taylor.*

B.

THE COURT BELOW FAILED TO RECOGNIZE THAT THE CENTRAL PLACE OF SECTION 2, FOURTH IN THE OVERALL SCHEME OF THE RLA DEMONSTRATES CONGRESSIONAL INTENT THAT THE SECTION COMPLETELY PREEMPT STATE CLAIMS

As already established, the Congressional intent necessary for complete preemption can be found in the overall purpose and scheme of a statute, as discerned from its legislative history as well as the statutory language itself. Where maintenance of a state claim interferes in any way with an interest *of central concern* to the federal statute, the cases establish that state law is displaced. *Taylor,* 107 S.Ct. at 1547; *Franchise Tax Board,* 463 U.S. at 25-26. Section 301 of the LMRA, for example, guarantees the right to enforcement of obligations embodied in collective bargaining agreements; because that interest is of central concern to the LMRA, a state claim for breach of contract to enforce the identical interest is completely preempted. *Avco Corp.,* 390 U.S. at 559-560; *Franchise Tax Board,* 463 U.S. at 22-24.

The right plaintiffs seek to vindicate through their state claim for violation of the public policy embodied in Cali-

fornia Labor Code sections 922 and 923 — the right to organize free of employer interference or retaliation — is of paramount concern to the RLA. That concern is evident not only on the face of the statute, but in its legislative history.

In enacting the RLA, Congress expressly stated that two of the five general purposes of the RLA were to protect freedom of association:

> The purposes of the chapter are: . . . (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join in a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; . . . .

45 U.S.C. § 151(a). *See Texas v. N.O.R. Co. v. Bhd. Ry. & S.S. Clerks,* 281 U.S. 548, 567-569, 50 S.Ct. 427, 74 L.Ed. 1034 (1930) ("Freedom of choice in the selection of representatives of each side of the dispute is the essential foundation of the statutory scheme").

Further, this Court has characterized the Section 2 right to organize as "a primary purpose" of the 1934 amendment which added Section 2, Fourth. *International Ass'n of Machinists v. Street,* 367 U.S. 740, 759, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961). *See* H.R. Rep. No. 1944, 73rd Congress, 2nd Sess. (1934), *reprinted in,* 4 Senate Committee on Labor & Public Welfare, *Legislative History of the RLA, As Amended* (1926-1966), at 918-919 (1974). The legislative history of the 1934 amendment reflects that Congress was "deeply concerned" with the importance of the rights established by Section 2, Fourth:

> The report of the Senate Committee on Inter-State Commerce indicates only that Congress was deeply concerned that there be adequate penalties for violation of § 2, (Fourth).[1] [Footnote 1: The Committee, reporting on the Senate version of the bill, S. 3266, stated that the "prohibition [contained in § 2, (Fourth)] is not new. Congress has declared it three times. But there are no penalties against its violation. This bill provides severe penalties for violation of the law." S. Rep. No. 1065, 73d. Cong. 2d Sess. 2 (1934).]

Burke v. Compania Mexicana de Aviacion, S.S., 433 F.2d 1031, 1033 & n.1 (9th Cir. 1970).

Thus, as with LMRA Section 301, Congress here fashioned a statute to place sanctions behind a critically important prohibition of federal substantive law. *See Avco Corp.*, 390 U.S. at 559 (Section 301 "was fashioned by Congress to place sanctions behind agreements to arbitrate"). Indeed, at least one court of appeals has found in the legislative history of this provision a Congressional intent that "Section 2 would be enforceable by private plaintiffs *in federal court*." *Stepanischen v. Merchants Despatch Transp. Co.*, 722 F.2d 922, 926 (1st Cir. 1983) (emphasis added).

Under the RLA, Congress singled out two important national industries — railroads and airlines operating interstate — for special regulation because of their overwhelming and immediate influence on interstate commerce. *Brotherhood of Railroad Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 40, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957). In *Machinists v. Central Airlines*, 372 U.S. 682, 83 S.Ct. 956, 10 L.Ed.2d 67 (1963), this Court analyzed the Congressional intent underlying the RLA and declared that "[t]he needs of the subject matter manifestly call for

uniformity." This Court examined the potential for disruption of this national scheme if state laws were not displaced by a uniform federal policy applicable to the same craft or class of employees in *every* state in which the carrier operated:

> As the dissenting judge below remarked: "... Congress in 1936 could not ... have thought that stability and continuity to interstate air would come from the undulating policies ... of the legislatures and courts (or both) of 48 states in the enforcement of anything thought so essential to industrial peace as this system of governmentally compelled arbitration."
>
> * * *
>
> The lack of uniformity created by dividing everything by 50 (or however many States the system spans) would multiply the burden by a substantial factor and aggravate the problem to an intolerable degree.

Id. at n.15, 16. Although these observations were made in the context of the interpretation and enforceability of labor contracts, the principles are equally, if not more, applicable in the context of plaintiffs' allegations of carrier interference with union organizing.

The decision of the Court of Appeals in this case threatens to destroy the national scheme of the RLA by opening the door to state regulation of representation issues in the air carrier and railroad industries. The Court of Appeals shunted aside the need for national uniformity recognized by Congress and this Court, and ignored the structure, purpose and legislative history of the RLA in its stilted, narrow reading of *Taylor*. As a consequence, there now exists the dangerous potential for conflicting federal and state regulation and resulting

instability in labor relations in these critical industries that Congress sought to prevent. In order to insure that the federal scheme of the RLA envisioned by Congress is not disrupted, and that the lower courts do not follow the Ninth Circuit in misapplying *Taylor* in this and other contexts, this Court should intervene in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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PSA, Inc.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD PRICE and JOE BRIDGES,
Plaintiffs-Appellees,
v.
PSA, INC.,
Defendant-Appellant.
No. 86-5973
D.C. No. CV-86-0030-S

PSA, INC.,
Petitioner,
v.
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
Respondent,
RICHARD PRICE AND JOE BRIDGES,
Real Parties in Interest.
No. 86-7462
D.C. No. CV-86-0030-S-IEG

Argued and Submitted
February 3, 1987 — Pasadena, California

Filed October 6, 1987

Before: Joseph T. Sneed, Jerome Farris and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Sneed

Appeal from the United States District Court
for the Southern District of California
Edward J. Schwartz, District Judge, Presiding

SUMMARY

Jurisdiction/Courts and Procedure

Petition for writ of mandamus. Denied.

Appellees Price and Bridges filed an action in state court alleging violation of federal statutes. Appellant PSA removed the action to federal court. Later, appellees sought to amend their complaint to allege state claims. The district court approved a stipulation between the parties providing for remand to state court if there is no federal jurisdiction upon the filing of appellees' amended complaint. The appellees filed their amended complaint and thought it satisfied the stipulation. They requested PSA's consent to remand the action. PSA withheld its consent on he ground that the appellees' claims alleging violation of the public policy inherent in California Labor Code § 922 and 923 were completely preempted by section 2 of the Railway Labor Act (RLA). The appellees responded by bringing a motion to remand the case to state court. The district court granted the motion. PSA sought review of the remand order. Before reaching the preemption issue appellees seek to preserve their advantage by invoking 28 U.S.C. § 1447(d) as a bar to review of the district court's remand order.

[1] Review of remand orders is prohibited by 28 U.S.C. § 1447(d). However, the Supreme Court has held that only remand orders issued under section 1447(c) and invoking the grounds specified therein — that removal was improvident and without jurisdiction — are immune from review under section 1447(d). [2] Immunity is not applicable in this case. [3] The well-pleaded complaint rule is the basic principle governing federal question jurisdiction when preemption is asserted. There is, however, a corollary to the rule called the "complete preemp-

tion" doctrine. [4] The RLA contains no civil enforcement provision such as the provisions in ERISA and the LMRA. Absent a direct expression of congressional intent to create federal jurisdiction for all causes of action within the scope of the RLA, this court believes it must abide by the well-pleaded complaint rule. [5] The district court did not abuse its discretion in remanding the appellees' state claims in its amended complaint back to state court.

COUNSEL

Marie Backes, San Diego, California, for the plaintiffs/appellees-real parties in interest.

Suzanne J. Holland, Los Angeles, California, for the defendant/appellant-petitioner.

OPINION

SNEED, Circuit Judge:

PSA, Inc. (PSA) seeks review of the district court's remand of this case to state court. PSA alleges that the plaintiffs' state law wrongful discharge claims are completely preempted by the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*, and thus the district court had no discretion to remand the case once it was properly removed. PSA seeks a writ of mandamus commanding the district court to rescind its remand order. We find that the plaintiffs' claims are not completely preempted, and we deny the petition for writ of mandamus.

I.

FACTS AND PROCEEDINGS BELOW

On May 8, 1985, Richard Price and Joe Bridges filed an action in the Superior Court for the State of California, alleging violation of four federal statutes: Title VII of the Civil Rights Act of 1964, the Railway Labor Act, the Age Discrimination in Employment Act, and 42 U.S.C. § 1981. PSA timely removed the action to federal court.

In January 1986, Price and Bridges, apparently believing a state forum was to be preferred, sought to amend their complaint to allege non-federal, State of California claims. On January 17, the district court approved a stipulation between the parties, which provided in pertinent part:

> IT IS FURTHER STIPULATED that, if upon filing a plaintiff's first amended complaint, it is apparent that there is no jurisdiction in the United States District Court, the parties agree that the action will be remanded to the Superior Court for the State of California, for the County of San Diego.

Appellant's Excerpt of Record at 31.

On January 27, the plaintiffs filed their first amended complaint, alleging, *inter alia,* (1) state law claims predicated upon violation of the public policy inherent in California Labor Code §§ 922 and 923, prohibiting retaliation for union organizing activities; and (2) claims based upon violation of the public policy inherent in California Code of Civil Procedure § 1209(a)(5), prohibiting disobedience of lawful orders of courts.

Price and Bridges thought their first amended complaint satisfied the stipulation. Accordingly, they requested PSA's consent to remand the action in

accordance with the parties' stipulation. PSA withheld its consent on the ground that the plaintiffs' claims alleging violation of the public policy inherent in California Labor Code §§ 922 and 923 were completely preempted by section 2 of the RLA. Thus were invoked the laws of preemption and removal, both functions of federalism.

On March 28, 1986, the plaintiffs responded by bringing a motion to remand the case to state court, and on April 28 the district court granted the motion. PSA stood its ground and timely sought review of the remand order. It both appealed the order and petitioned this court for a writ of mandamus to prevent the remand of the case to state court.

Before reaching the preemption issue Price and Bridges seek to preserve their advantage by invoking 28 U.S.C. § 1447(d) as a bar to review of the district court's remand order. We shall discuss this issue initially.

II.

REVIEWABILITY OF REMAND ORDER

[1] Review of remand orders appears to be prohibited by 28 U.S.C. § 1447(d), which provides that an "order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." However, the Supreme Court limited the scope of § 1447(d) in *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336 (1976). It held that relief by writ of mandamus was available to prevent a district court in a diversity case from ordering a remand solely on the grounds that its docket was congested and that the case would be expedited in state court. *Id.* at 351-53. The Court reasoned that the prohibition on review found in § 1447(d) can only be read in conjunction with 28 U.S.C. § 1447(c), which

provides that "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case." *See Id.* at 345-46. The Court concluded that "only remand orders issued under § 1447(c) and invoking the grounds specified therein — that removal was improvident and without jurisdiction — are immune from review under § 1447(d)." *Id.* at 346.

[2] That immunity is not applicable in this case. Both parties agree, as they must, that this case was not removed "improvidently and without jurisdiction." At the time of removal the plaintiffs stated only federal claims; removal was clearly proper. This does not resolve the matter, however. Price and Bridges argue that this circuit, in its post-*Thermtron* decisions, has limited review of remand orders to permit it only in those situations in which the remand was based on a substantive decision on the merits apart from any jurisdictional determination. *See Clorox Co. v. United States District Court,* 779 F.2d 517 (9th Cir. 1985); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.,* 741 F.2d 273 (9th Cir. 1984). Inasmuch as the remand here was based upon a lack of jurisdiction and not a matter of substantive law,[1] Price and Bridges insist

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[1]The appellants argue that the district court's remand was based on its construction of the parties' stipulation , a matter of substantive law, rather than on jurisdictional grounds. A review of the transcript from the court's hearing on the motion to remand reveals the contrary — the court's remand was based upon its perceived discretion to remand the remaining state claims once the federal claims had dropped out. The court did, as a preface to its findings, note its belief that both parties had "contemplated" that the plaintiffs would be able to state a cause of action requiring remand. Reporter's Transcript at 10. However, the court went on to specifically find that "[a]s far as the law is concerned, it appears to the court that the plaintiff has stated what are state causes of action under state statutes." *Id.* The district court therefore relied upon its perceived discretion to remand the case where jurisdiction is solely pendent.

that the *Pelleport-Clorox* immunity exists. Under those circumstances, they contend that we should find the remand order unreviewable.

We disagree. They read *Pelleport* and *Clorox* improperly. In neither case did we attempt to fix the outer limit of reviewability. In *Pelleport,* we found reviewable a remand based on the conclusion by the district court that a forum selection clause was valid and enforceable. 741 F.2d at 275. We found the remand reviewable because the order was based, not on jurisdictional grounds, but rather on a substantive determination affecting the rights of the parties. *Id.* at 276-77. In *Clorox,* our review of the district court's remand order was based on a substantive determination that Clorox had waived its right to removal by informing employees in its employee handbook that suits to recover benefits under the plan in question could be filed in state or federal court. 779 F.2d at 520-21. In both cases we held that a remand order is *appealable* as a collateral order under 28 U.S.C. § 1291 where the remand is based on a decision on the merits, apart from any jurisdictional decision. Such appeals are appropriate because Congress did not intend to preclude review of a decision on the merits simply because it preceded a remand order.

As already indicated, both parties acknowledge that this is not a case in which removal was improvident and without jurisdiction. On the basis of the original complaint the removal was proper. The remand order was based on the district court's perceived discretion to remand the remaining state claims. Because the order was not a mandatory remand under § 1447(c), it enjoys no immunity from review. While reviewable, the order does not fall within the narrow class of remand orders that are *appealable* because the remand order did not result from

a determination on the merits of a non-jurisdictioinal issue. *See Pelleport,* 741 F.2d at 273. Rather, under *Thermtron,* the order is reviewable on a petition for a writ of mandamus. 423 U.S. at 352-53.

Our disposition of the remand reviewability issue is in accordance with three recent decisions in this circuit. *See Scott v. Machinists Automotive Trades Dist. Lodge, No. 190,* No. 86-1620 (9th Cir. Sept. 8, 1987); *Survival Sys. of the Whittaker Corp. v. United States District Court,* No. 85-7005 (9th Cir. Aug. 27, 1987); *Paige v. Henry J. Kaiser Co.,* No. 84-2246 (9th Cir. Aug. 27, 1987). In each case we held that a district court's order remanding pendent state claims on discretionary grounds was not pursuant to § 1447(c) and thus was reviewable on a petition for a writ of mandamus.

III.

COMPLETE PREEMPTION UNDER THE RLA

We now turn to the issue whether the plaintiffs' state law claims for wrongful discharge in retaliation for union organizing activities under California Labor Code §§ 922 and 923[2] are completely preempted by section 2, Fourth

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[2]Sections 922 and 923 state:

> Any person or agent or officer thereof who coerces or compels any person to enter into an agreement, written or verbal, not to join or become a member of any labor organization, as a condition of securing employment or continuing in the employment of any such person is guilty of a misdemeanor.
>
> In the interpretation and application of this chapter, the public policy of this State is declared as follows:
>
> Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employ-

of the RLA.[3] If so, the district court had no discretion to remand the case to state court. We are guided by the Supreme Court's two recent pronouncements on the subject of "preemption removal." *See Caterpillar Inc. v. Williams,* 107 S. Ct. 2425 (1987); *Metropolitan Life Ins. Co. v. Taylor,* 107 S. Ct. 1542 (1987). *Taylor* and *Williams* both dealt with the question whether, and under what circumstances, removal can be based upon a defendant's allegation of federal preemption. We confront the problem in a slightly different context here because this case was properly removed on the basis of federal question jurisdiction, and the plaintiffs later amended their complaint to allege only state claims on the face of their

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ers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Cal. Lab. Code §§ 922,923 (West 1971).

[3]Section 2, Fourth of the RLA provides, in pertinent part:

No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . .

45 U.S.C. § 152, Fourth (1982).

complaint. Nevertheless, the analysis here is identical to that of the "preemption removal" cases. This case requires us to determine whether a federal statute entirely displaces an area of state law such that any cause of action within the scope of the federal statute necessarily "arises under" federal law.

[3] In *Taylor,* the Court adhered to the well-pleaded complaint rule as the basic principle governing federal question jurisdiction when preemption is asserted. 107 S. Ct. at 1546. Ordinarily federal preemption is merely a defense to the plaintiff's state law complaint. *Id.* As a defense, it does not appear on the face of a well-pleaded complaint, and therefore does not provide a basis for federal question jurisdiction. *Id.* There exists, however, a "corollary" to the well-pleaded complaint rule called the "complete preemption" doctrine. *Id.* In select cases the Court has decided that the preemptive force of a federal statute is so "extraordinary" that it "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Id.* at 1547. The complete preemption corollary to the well-pleaded complaint rule applies primarily to claims preempted by § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 (1982). *Williams,* 107 S. Ct. at 2430. The Court first singled out § 301 claims for such special treatment in *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists,* 390 U.S. 557 (1968), which held that § 301 completely displaces state causes of action "for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a) (1982).

[4] The Court in *Taylor* extended the *Avco* principle to hold that state law claims within the scope of ERISA § 502(a) are completely displaced by ERISA's civil enforcement provision. Although ERISA contains a broad

civil enforcement framework, the Court was reluctant to apply the complete preemption exception to the well-pleaded complaint rule outside of the § 301 context:

> Even with a provision such as § 502(a)(1)(B) that lies at the heart of a statute with the unique preemptive force of ERISA . . . we would be reluctant to find that extraordinary preemptive power, such as has been found with repect to § 301 of the LMRA, that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.

107 S. Ct. at 1547.

The Court's decision to extend *Avco* was based on (1) the virtual identity between the jurisdictional schemes of ERISA § 502(f) and LMRA § 301, and (2) congressional history expressly linking those two provisions:

> The presumption that similar language in two labor law statutes has a similar meaning is fully confirmed by the legislative history of ERISA's civil enforcement provisions. The Conference Report on ERISA describing the civil enforcement provisions of § 502(a) says:
>
> > "[W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. *All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.*" H.R. Conf. Rep. No. 93-1280, p. 327 (1974) (emphasis added).

> No more specific reference to the *Avco* rule can be expected . . . .

107 S. Ct. at 1547. The Court rejected the contention that a state claim is completely preempted if the preemption defense is "obvious." *Id.* at 1548. The test is whether Congress has "clearly manifested an intent" to convert a state law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. *Id.*

The RLA contains no civil enforcement provision such as the provisions in ERISA and § 301 of the LMRA. In fact, section 2, Fourth of the RLA contains no civil enforcement provision whatsoever. This circuit has held that an implied private right of action exists under RLA section 2, Fourth. *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 936 (9th Cir. 1987). However, Congress has not indicated, as it did with LMRA § 301 and ERISA, that the RLA is "so powerful as to displace entirely any state cause of action." *Taylor*, 107 S. Ct. at 1546 (quoting *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983)). Absent a direct expression of congressional intent to create federal jurisdiction for all causes of action within the scope of section 2, Fourth of the RLA, we believe we must abide by the well-pleaded complaint rule. Congress or the Supreme Court can steady us if either finds our step faulty. We hold that the plaintiffs' state law causes of action in their amended complaint are not completely preempted by the RLA. [4]

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[4]PSA argues that even if the plaintiffs' claims are not completely preempted, we should recharacterize the claims as "arising under" federal law pursuant to the "artful pleading doctrine." PSA contends that the appellees' state claims were "artfully pled" in order to avoid federal jurisdiction. In *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), the Supreme Court invoked the artful pleading doctrine when a plaintiff tried to avoid the preclusive effect of a prior adverse

V.

PROPRIETY OF REMAND ORDER

[5] Having determined that the plaintiffs' amended complaint alleged purely state claims, the remaining issue is whether the district court properly remanded those claims. Once the basis for removal jurisdiction is dropped from the proceedings, a federal court, although possessing the power to hear the remaining state claims, is not obliged to exercise that power. *Swett v. Schenk*, 792 F.2d 1447, 1450 (9th Cir. 1986). Further, the rule in this circuit is that the district court has discretion to remand the rest of the action to the state court from which it is removed. [5] *Id.* The district court in this case did not abuse its discretion in remanding the plaintiffs' state claims in its amended complaint back to state court.

We express no opinion on the merits of PSA's federal preemption defense. We have confidence in the ability and

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judgment. *See id.* at 397 n.2. We have recently held that use of the doctrine is limited to cases such as *Moitie* where a plaintiff is seeking to circumvent the res judicata impact of a federal judgment. *Sullivan v. First Affiliated Sec., Inc.*, 813 F.2d 1368, 1376 (9th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3093 (U.S. Aug. 11, 1987) (No. 87-102). *Moitie* has no application to the facts of this case.

[5]Several appellate courts have held that remand for reasons not recognized in § 1447(c) is prohibited. *See Cook v. Weber*, 698 F.2d 907 (7th Cir. 1983); *Levy v. Weissman*, 671 F.2d 766 (3d Cir. 1982). The Supreme Court has granted certiorari to decide the question of whether a remand based on non-statutory grounds is permissible. *See Boyle v. Carnegie-Mellon Univ.*, 648 F. Supp. 1318 (W.D. Pa. 1985), *mandamus denied*, No. 85-3619 (3d Cir. Nov. 24, 1986), *cert. granted*, 107 S. Ct. 1283 (1987).

willingness of state courts to enforce federal defenses. The petition for writ of mandamus is denied. [6]

PETITION DENIED.

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[6]We strongly disapprove of the plaintiffs' abuse of the judicial process in this case. We agree with the following statement by a district court faced with a similar situation:

> When a plaintiff chooses a state forum, yet also elects to press federal claims, he runs the risk of removal. A federal forum for federal claims is certainly a defendant's right. If a state forum is more important to the plaintiff than his federal claims, he should have to make that assessment before the case is jockeyed from state court to federal court and back to state court. The jockeying is a drain on the resources of the state judiciary, the federal judiciary and the parties involved; tactical manipulation such as plaintiff has employed cannot be condoned.

Austwick v. Board of Educ., 555 F. Supp. 840, 842 (N.D. Ill. 1983). In the event that the plaintiffs once again amend their complaint in state court to allege federal claims, such that the case is again subject to removal, we are quite certain that the district court will entertain a motion by PSA for costs and expenses caused by the plaintiffs' manipulation of pleadings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD PRICE and JOE BRIDGES,
Plaintiffs-Appellees,

v.

PSA, INC.,
Defendant-Appellant.

No. 86-5973
DC No. CV-86-0030-S

APPEAL from the United States District Court for the Southern District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the petition for writ of mandamus is denied.

Filed and entered October 6, 1987

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PSA, INC.
Petitioner,
v.
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA,
Respondent,
RICHARD PRICE and JOE BRIDGES,
Real Parties In Interest.

No. 86-7462
DC# CV-86-0030-S-IEG

ORDER

Before: SNEED, FARRIS, and NOONAN, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R.App.P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE EDWARD J. SCHWARTZ,
JUDGE PRESIDING

RICHARD PRICE and JOE BRIDGES,
Plaintiffs,
v.
PSA, INC., KEN TOWERS, ALLEN HEMENWAY, etc.,
Defendants.

Civil No. 86-0030-S

EXCERPTS FROM
REPORTER'S TRANSCRIPT OF PROCEEDINGS
San Diego, California
Monday, April 28, 1986

APPEARANCES:

For the Plaintiffs: BACKES and FRIESEN
By: MARIE BACKES
655 Fourth Street
Suite 24
San Diego, California 92101

For the Defendants: MESERVE, MUMPER & HUGHES
By: SUZANNE HOLLAND
333 South Hope Street
35th Floor
Los Angeles, California 90071

THE CLERK: Case No. 12 on calendar, 86-0030, Richard Price, et al. v. PSA; on for hearing plaintiff's motion for order remanding action to state court, and for costs.

* * *

[Argument of Counsel]

THE COURT: Thank you, Ms. Holland.

First of all, I think Counsel on both sides of this case contemplated that the plaintiffs would be able to state a cause of action that would require the remand of this matter to the Superior Court and, in fact, on January 14th of this year, they entered into a stipulation virtually to that effect.

As far as the law is concerned, it appears to the Court that the plaintiff has now stated what are state causes of action under state statutes. I don't find that there's been a complete preemption with regard to these claims. I think, particularly in view of the fact that these are non union plaintiffs, they have stated their cause of action pursuant to state law and, accordingly, the Order of the Court will be that this matter be remanded for further proceedings to the state Superior Court.

Ms. Backes, will you please prepare an order and submit it to opposing counsel for approval as to form.

(Other matters heard.)

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RICHARD PRICE and JOE BRIDGES
Plaintiffs,
v.
PSA, INC., and DOES 1 through 100 inclusive,
Defendants.

CASE NO. 86-0030 S (IEG),

ORDER GRANTING PLAINTIFFS' MOTION TO REMAND

Plaintiffs' Motion to Remand the above-entitled action to state Superior Court, was heard in Courtroom 4 of the above-named court, before the Honorable Edward J. Schwartz, U.S. District Court Judge. Marie Backes of BACKES & FRIESEN appearing on behalf of the Plaintiffs and Suzanne Holland of MESERVE, MUMPER & HUGHES appearing on behalf of the Defendants.

After considering the pleadings, files and records herein, and oral argument at the hearing of the motion, IT IS HEREBY ORDERED:

That Plaintiffs' Motion to Remand is GRANTED, this Court having determined that the Railway Labor Act does not preempt Plaintiffs' state law unlawful discharge causes of action based on public policy violations of California Labor Code Section 922-923, and further, that no federal question lies in Plaintiffs' state law unlawful discharge causes of action based on public policy viola-

tions of California Code of Civil Procedure, section 1209(5); and,

That Plaintiffs' Motion for Costs is DENIED.

APPROVED AS TO FORM AND CONTENT:

Dated: April 28, 1985

MARIE BACKES

Marie Backes
Backes & Friesen

Disapproved as to form and content:
Dated:

SUZANNE HOLLAND

Suzanne Holland
Meserve, Mumper & Hughes

Dated: May 19, 1986

EDWARD J. SCHWARTZ

Honorable Edward J. Schwartz
Judge of the U.S. District Court

APPENDIX F

STATUTORY PROVISIONS INVOLVED

California Labor Code Section 922 provides:

Any person or agent or officer thereof who coerces or compels any person to enter into an agreement, written or verbal, not to join or become a member of any labor organization, as a condition of securing employment or continuing in the employment of any such person is guilty of a misdemeanor.

California Labor Code Section 923 provides:

In the interpretation and application of this chapter, the public policy of this State is declared as follows:

Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The relevant sections of Title 28, United States Code provides:

§ 1331.

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§ 1441.

Actions removable generally

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Section 2 of the Railway Labor Act, 45 U.S.C. § 152, provides:

§ 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of

any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representa-

tive of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their

duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecutions and penalties

The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this secton shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the

expenses of the courts of the United States: *Provided,* That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted —

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an em-

ployee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become aa member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On March 7, 1988, I served the within Petition for Writ of Certiorari in re: "P.S.A Inc., vs. United States District Court/Richard Price and Joe Bridges" in the United States Supreme Court, October Term 1987, No .....;

On the respondents Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

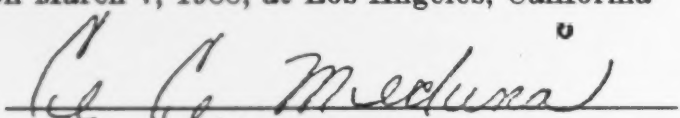
Marie Backes, Esq.
Backes & Friesen
2044 First Avenue
Suite 201
San Diego, California 92101

United States District Court
Southern District of California
940 Front Street
San Diego, California 92189

All Parties to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on March 7, 1988, at Los Angeles, California



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